VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

DIANE SMITH, Claimant

Opinion by DUDLEY
Commissioner

v. JCN VA000-0024-6296

August 7, 2012

MATURE OPTIONS, INC., Employer
THE CINCINNATI INSURANCE CO., Insurer

Jamie L. Karek, Esquire
for the Claimant.

Joseph C. Veith, III, Esquire
for the Defendants.

REVIEW on the record by Commissioner Dudley, Commissioner Williams, and Commissioner Marshall at Richmond, Virginia.

This case is before the Commission at the request of both parties for Review of the Deputy Commissioner's April 5, 2011, Opinion that found that the claimant's ongoing treatment and disability are related to the compensable injury; that the claimant did not unjustifiably refuse surgery; and that the claimant refused selective employment within her restrictions. The Opinion addressed the claimant's marketing efforts and determined that, had marketing been necessary, the claimant failed to adequately market her residual work capacity. The claimant asserts the Deputy Commissioner erred in finding she refused selective employment because the positions offered were not within her restrictions, and that she did not adequately market her residual work capacity. The employer asserts the Deputy Commissioner erred in finding the claimant proved her ongoing disability and medical treatment causally related to the compensable injury, and that the surgery refused was not reasonable medical treatment.

On April 1, 2010, the claimant, an LPN, twisted her back assisting a patient to stand. The employer accepted the accident and low back injury as compensable. The claimant sought treatment the same day at Patient First. She complained of low back pain with pain in her legs. She disclosed that she had a prior back injury that resulted from a motor vehicle accident in 2008, but testified that she had not had any problems with her back since then. X-rays taken at Patient First revealed pre-existing scoliosis and grade two spondylolisthesis of L5-S1 with narrowing of the intervertebral disc space. The claimant was diagnosed as having sustained a lumbar sprain. She was given an off work slip until her follow-up appointment on April 5, 2010.

On April 5, 2010, the claimant reported no improvement in her pain and that she was still having "discomfort down the legs." The diagnosis remained lumbar sprain, but the possibility of sciatica was added. She was referred to an orthopedist and physical therapy. The claimant was continued out of work "per specialist."

On May 11, 2010, the claimant sought treatment at West End Orthopaedics, with Dr. Thomas N. Scioscia. She reported her pain was bilateral but "mostly on the left side." Dr. Scioscia reported:

> X-rays today show she has a spondylolisthesis at L5-S1 that looks like it has gone on to fuse now but AP, lateral and flexion views have no obvious signs of instability except the spondylolisthesis that hopefully has fused.

He diagnosed spondylolisthesis L5-S1, spinal stenosis and radiculitis. He referred the claimant for an MRI and he released her to return to work on light duty on May 12, 2010, with no lifting, bending, or twisting greater than twenty pounds.

On May 25, 2010, the MRI confirmed the spondylolisthesis and spondylosis at L5-S1 and her pre-existing scoliosis. On June 1, 2010, Dr. Scioscia reviewed the MRI and recommended the claimant have an epidural steroid injection. He stated the MRI did not confirm a fusion at L5-S1.

Dr. Scioscia continued the claimant's light duty release. The injection was completed on July 9, 2010.

On August 4, 2010, the claimant reported only a ten percent improvement of her symptoms after the injection. Her pain continued to radiate down her left leg. Dr. Scioscia referred the claimant for a CT scan. He noted that her lack of improvement after the injection caused him to think she might not be a "great candidate" for surgery.

The CT scan was completed on August 25, 2010, and showed "L5-S1 spondylolisthesis, degenerative disc disease and [ ] facet arthropathy resulting in moderate spinal canal stenosis." On August 31, 2010, Dr. Scioscia reported the claimant's "spondylolisthesis has not auto fused and is severely degenerative. She exacerbated this at work and this continues to be a work related incident." He recommended a Functional Capacity Evaluation and offered the claimant a one level fusion at L5-S1, but the claimant declined surgery.

The claimant returned to Dr. Scioscia on October 18, 2010, and told him that she "gets back pain especially when walking long distances and lifting heavy patient[s]." He said she "continues with isthmic spondylolisthesis." Dr. Scioscia offered the claimant surgery again, but the claimant declined. He noted that he thought it was "reasonable to try to continue to treat this conservatively." He modified her light duty restrictions and reduced the weight limit to fifteen pounds and added that she could not walk long distances. He made these restrictions permanent.

On February 7, 2011, the claimant returned to Dr. Scioscia and reported she still had pain that radiated down her left leg. They discussed surgery again and she declined. He referred her to a pain management specialist and advised that he did not need to see her again unless she wanted to go forward with the surgery.

Prior medical evidence shows that the claimant sought treatment at Patient First on September 9, 2000, and stated that she had had one week of low back pain that radiated around her. She was diagnosed with a possible urinary tract infection. On April 18, 2007, the claimant sought treatment with Dr. Wilhelm Zuelzer for low back pain that radiated through her right trochanter. He thought the pain was entirely mechanical. On September 11, 2008, the claimant went to Patient First with blood in her urine. She reported central low back pain without radicular symptoms. X-rays performed at the time showed grade three anterior spondylolisthesis of L5-S1 with narrowing of the intervertebral spaces. On September 17, 2008, the claimant sought treatment at West End Orthopaedics, with Dr. Charles Vokac. He diagnosed axial back pain that was probably discogenic pain with referred pain into her groin.

Patricia Hinson, Director of Personnel Services, testified that she offered the claimant a position on May 21, 2010, working within her restrictions, dispensing medication between the hours of 12:00 a.m. to 8:00 a.m., but the claimant declined stating it was "too much" for her. The claimant returned to work briefly in June 2010. She was assigned to be a companion between 5:00 p.m. and 9:00 p.m. She worked full time within her restrictions, but the assignment ended. Hinson offered another position from 7:00 p.m. to 7:00 a.m. within her restrictions dispensing medication and remaining with the patient, but the claimant declined, stating that she did "not work twelve hour shifts at night." On cross-examination, Hinson confirmed that the claimant would be responsible for calling for help if the patient fell or physical action was required.

The claimant testified that she refused the overnight positions because her medication affected her ability to stay awake. She refused another position because she knew the patient liked to go to the mall to walk after lunch and she could not walk long distances without using

her walker. She also knew that the patient liked to drive and she did not feel safe driving on medication.

Deborah Repp, President and CEO, testified that she was aware of the claimant's motor vehicle accident and that the claimant suffered a fractured femur. She spoke with the claimant upon her return to work, and the claimant told her that she "had a lot of pain in her back and that it, it prevented her from, . . ., standing and that that was part of what had kept her away from work." (Tr. at 49).

The claimant began marketing her residual work capacity in July 2010. She has completed one year of college and her LPN training. She has been an LPN for sixteen years. She registered with the Virginia Employment Commission, searched the Internet and newspapers, and applied for positions online. She testified she was looking for desk jobs but also anything within her restrictions. She had no interviews, no offers and received no rejection letters.

The Deputy Commissioner found that the claimant proved that her ongoing treatment and disability are causally related to the compensable accident based on the medical evidence, and that she did not refuse surgery based on Dr. Scioscia's statement that it was an option. She further found that the claimant refused selective employment offered by the employer based on her work restrictions at the time the positions were offered and the employer's testimony regarding the physical demands of the positions. Finally, although it does not impact the decision, the Deputy Commissioner determined the claimant's marketing would have been inadequate as the records did not contain sufficient detail about the applications and many of the positions were nursing positions, not within her restrictions.

The claimant argues that the light duty positions offered were not within her restrictions and were, therefore, not *bona fide* offers of selective employment.

> To support a finding of refusal of selective employment 'the record must disclose (1) a *bona fide* job offer suitable to the employee's capacity; (2) [a job offer that was] procured for the employee by the employer; and (3) an unjustified refusal by the employee to accept the job.'" James v. Capitol Steel Constr. Co., 8 Va. App. 512, 515, 382 S.E.2d 487, 489 (1989) (quoting Ellerson v. W.O. Grubb Steel Erection Co., 1 Va. App. 97, 98, 335 S.E.2d 379, 380 (1985)).

Atlas Plumbing and Mechanical, Inc. v. Lang, 38 Va. App. 509, 512, 566 S.E.2d 871, 872-73 (2002).

"In the case of a refusal of selective employment, the employer has the burden to show that the position offered is within the employee's residual capacity." American Furniture Co. v. Doane, 230 Va. 39, 42, 334 S.E.2d 548, 550 (1985) (citing Klate Holt Co. v. Holt, 229 Va. 544, 545, 331 S.E.2d 446, 447 (1985) and Talley v. Goodwin Brothers, 224 Va. 48, 52, 294 S.E.2d 818, 820 (1982)).

The employer offered the claimant three positions. The claimant agreed that the positions were offered. The parties did not agree on the claimant's reasons for refusing the positions. The claimant said that the pain medications prevented her from staying up through an overnight shift and caused her to feel uncomfortable about driving. She also said that she would need to use a walker to walk the distance in the mall. She did not think she could help the patient while using her own walker.

The employer stated the claimant refused the positions stating that the overnight shift was "too much" and that she "did not work twelve hour shifts at night." The employer testified the three positions did not require anything physical. The positions involved being with the patient and administering medication. Hinson agreed that one position would require the claimant to

render first aid if the patient fell, but not to lift her. She would have to call for emergency services.

Patient First took the claimant out of work from April 1 through April 4, 2010, and when she returned on April 5, 2010, her release to return to work was listed as "per specialist." On May 11, 2010, Dr. Scioscia said that the claimant could resume light work on May 12, 2010, with no lifting, bending or twisting over twenty pounds until after the MRI was scheduled. On May 26, 2010, Dr. Scioscia noted that she was unable to work from May 28 to June 1, 2010, and may resume regular work on June 2, 2010. On June 1, 2010, he revised that release and said that she could resume light duty on June 2, 2010, with no lifting, bending or twisting over fifteen pounds until after the injection. Finally, on October 18, 2010, Dr. Scioscia stated that the claimant could work light duty with no lifting, bending or twisting over fifteen pounds and no walking long distances. Those restrictions are permanent.

The claimant was first offered light duty work on May 21, 2010, which she refused. She cured her selective refusal in June by accepting one position offered by the employer, but that employment did not last through no fault of the claimant. After that position ended, the claimant was offered additional positions which she refused.

The medical evidence from Dr. Scioscia and Patient First do not reflect any restriction on the claimant's driving due to her pain medication or any problem with her staying up at night to work. The records also do not restrict her walking until October 18, 2010. The claimant said that her pain medication prevented her from accepting the positions. This is not supported by the evidence. We agree with the Deputy Commissioner's determination that the claimant unjustifiably refused light duty offered by the employer.

The claimant next argues that she adequately marketed her residual capacity. She registered with the VEC and sought employment on the Internet. She provided a voluminous job search record that included adequate information on some portions with contact names, dates, and types of employment. She did not provide the same detail for her applications. She does provide confirmation of Internet contacts. She has not had any interviews and has applied for a significant number of nursing positions which are outside her physical restrictions. Although the Deputy Commissioner found that she would find the claimant's marketing efforts inadequate, she observed that it was not necessary that marketing be considered. Since we affirm the Deputy Commissioner's determination that the claimant unjustifiably refused light duty, we make no finding as to the adequacy of the claimant's marketing efforts.

Next, we address the employer's appeal. The employer argues that the claimant did not prove a causal relationship between her current disability and medical treatment and the compensable accident. Also, the employer argues that the claimant unjustifiably refused medical treatment, specifically surgery.

"Any medical opinion offered into evidence 'is not necessarily conclusive, but is subject to the commission's consideration and weighing.'" Farmington Country Club v. Marshall, 47 Va. App. 15, 26, 622 S.E.2d 233, 239 (2005) (quoting Hungerford Mech. Corp. v. Hobson, 11 Va. App. 675, 677, 401 S.E.2d 213, 215 (1991)).

"The probative weight to be accorded [medical] evidence is for the Commission to decide; and if it is in conflict with other medical evidence, the Commission is free to adopt that view 'which is most consistent with reason and justice.'" Georgia-Pacific Corp. v. Robinson, 32 Va. App. 1, 5, 526 S.E.2d 267, 269 (2000) (quoting C.D.S. Const. Services v. Petrock, 218 Va. 1064, 1070, 243 S.E.2d 236, 240 (1978)).

The employer argues that the Deputy Commissioner erred by relying on the treating physician's opinion and the fact that there was no evidence that contradicted Dr. Scioscia's opinion.

The employer asserts that Dr. Scioscia's opinion is based solely on the claimant's subjective complaints and, because she was not a credible witness, her subjective complaints are shaded in doubt. The employer admits the Deputy Commissioner did not make any specific credibility determination.

"Whenever a physician's diagnosis flows from an assumption that rests upon a faulty premise, such as misinformation provided by a claimant, the commission may refuse, and often will be required to refuse, to attribute any weight to that opinion." Sneed v. Morengo, Inc., 19 Va. App. 199, 205, 450 S.E.2d 167, 171 (1994). *See also* Howell Metal Co. v. Adams, 35 Va. App. 184, 188, 543 S.E.2d 629, 631 (2001); Hoffman v. Carter, 50 Va. App. 199, 215, 648 S.E.2d 318, 326 (2007); Clinchfield Coal Co. v. Bowman, 229 Va. 249, 252, 329 S.E.2d 15, 16 (1985).

The employer asserts that there are several facts that support the claimant's lack of credibility. The accident happened on her first day back at work after being off for three months due to a motor vehicle accident. During her three months off, the claimant complained of an inability to stand for long periods. Her treating physician suggested a physiatrist. There is a lack of objective testing that supports the claimant's subjective complaints and, finally, the claimant's refusal of light duty employment within her restrictions.

The evidence here is that the claimant's treating physician related the claimant's current medical condition and ongoing need for treatment to her compensable accident. The x-rays and CT scan confirm grade 2 anterior spondylolisthesis of L5-S1 with narrowing of the intervertebral

disc space. Initially, Dr. Scioscia thought the claimant's spine had fused on its own, but the CT scan showed that it had not. He then offered surgery to fuse that level. He referred the claimant for pain management when she chose not to go forward with surgery. In his deposition, he said that he did not think the surgery was currently necessary. He agreed there was a lack of objective findings at this time and it was reasonable for the claimant to continue conservative treatment. There is no evidence to the contrary.

We agree with the Deputy Commissioner and find that the medical evidence provided by the claimant was sufficient to prove the causal relationship between her current disability and her compensable injury.

Finally, the employer argues that the claimant unjustifiably refused surgery. We disagree.

A claimant is not required to undergo medical treatment that involves a serious risk or suffering, but is required to undergo medical treatment that a "man of ordinary manly character" would undergo "for his own good." A claimant's refusal to undergo a simple surgery or other medical treatment that involved no serious risk to life or health, and which, according to a medical opinion, offer a reasonable prospect of cure, bars him from compensation because his ongoing disability is not related to the original accident but it is related to his unreasonable refusal to have medical treatment. "The distinction is between being reasonable and unreasonable." *See* Stump v. Norfolk Shipbuilding Corp., 187 Va. 932, 938-39, 48 S.E.2d 209, 212 (1948).

Here, the claimant's treating physician has opined that it is reasonable for her to continue conservative treatment. Dr. Scioscia has not provided evidence that the surgery will be successful or that it has a minimal risk associated with it. Spinal surgery is, inherently, a surgery

that has significant risks. After the claimant had little success with the injection, Dr. Scioscia offered that the lack of success indicated she might not be a good candidate for surgery. Accordingly, we find that the claimant is not unjustifiably refusing surgery.

For the reasons stated, the Opinion of the Deputy Commissioner is AFFIRMED.

Interest is payable on the Award pursuant to Code § 65.2-707. The claimant's attorney is awarded an attorney's fee of $300.00 added to the previous award of $300.00 for a total fee of $600.00, which shall be paid directly to counsel by the claimant.

This matter is hereby removed from the Review docket.

APPEAL

You may appeal this decision to the Virginia Court of Appeals by filing a Notice of Appeal with the Commission and a copy of the Notice of Appeal with the Virginia Court of Appeals within 30 days of the date of this Opinion. You may obtain additional information concerning appeal requirements from the Clerks' Offices of the Commission and the Virginia Court of Appeals.

cc: Diane Smith
Mature Options, Inc.
Cincinnati Insurance Co.